

No. 14,593

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,
Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,
Appellees.

On Appeal from the District Court of Guam
for the Unincorporated Territory of Guam.

APPELLANTS' REPLY BRIEF.

FILED

AUG - 2 1955

PAUL P. O'BRIEN, CLERK

FINTON J. PHELAN, JR.,
Suite 201-203, Mesa Building,
First Street West, Agana, Guam,
Attorney for Appellants.

Subject Index

	Page
Jurisdiction and statement of the case.....	1
Statutes and other authorities	1
I. Appellants' answer to Appellees' Point I	4
II. Appellants' reply to Appellees' Second Point	7
III. Appellants' reply to Appellees' Point III.....	7
IV. Appellants' reply to Appellees' Point IV	9
V. Appellants' reply to Appellees' Point V.....	11
VI. Appellants' reply to Appellees' Point VI	11
VII. Appellants' reply to Appellees' Point VII	12
VIII. Appellants' reply to Appellees' Point VIII	12
IX. Appellants' reply to Appellees' Point IX.....	12
X. Appellants' reply to Appellees' Point X.....	13
XI. Appellees have conceded appellants' position in this cause by the executive action of appellee Elvidge sub- sequent to the docketing of this appeal.....	14
Conclusion	16
Appendix.	

Table of Authorities Cited

	Pages
Executive Order No. 10178, 31 October 1950.....	2, 6
Title 48, USCA, 1421 C (Section 25, Organic Act)	1, 2
Title 48, USCA, 1421 F (Section 28, Organic Act)	2, 3, 6
Title 48, USCA, 1421 K (Section 33, Organic Act)	4, 6

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN WILSON, LEONARD WHITE, PAUL
BOGOVICH, and ELIZABETH TINTORRI,

Appellants,

VS.

B. L. KENNEDY, FORD Q. ELVIDGE,
HOWARD D. PORTER, and RICHARD
F. TAITANO,

Appellees.

**On Appeal from the District Court of Guam
for the Unincorporated Territory of Guam.**

APPELLANTS' REPLY BRIEF.

JURISDICTION AND STATEMENT OF THE CASE.

These have been adequately covered in appellants' opening brief and the appellees' reply brief.

STATUTES AND OTHER AUTHORITIES.

Statutes:

Title 48, USCA 1421c. Certain laws continued in force; modification or repeal of laws; applicability of Acts of Congress.

* * * * *

(b) Except as otherwise provided in this chapter, no law of the United States hereafter

enacted shall have any force or effect within Guam unless specifically made applicable by Act of the Congress either by reference to Guam by name or by reference to "possessions". The President of the United States shall appoint a commission of seven persons, at least three of whom shall be residents of Guam, to survey the field of Federal statutes and to make recommendations to the Congress of the United States within twelve months after August 1, 1950 as to which statutes of the United States not applicable to Guam on such date shall be made applicable to Guam, and as to which statutes of the United States applicable to Guam on such date shall be declared inapplicable. Aug. 1, 1950, c. 512, §25, 64 Stat. 390.

* * * * *

Section 25, Organic Act.

* * * * *

Title 48, USCA 1421f. Title to property transferred.

* * * * *

(b) All other property, real and personal, owned by the United States in Guam, not reserved by the President of the United States within ninety days after August 1, 1950,

* * * * *

Section 28, Organic Act.

* * * * *

Executive Order No. 10178, Oct. 31, 1950, 15 F.R. 7313

Reservation of Property in Guam for Use of United States

Now Therefore, by virtue of the authority vested in me by the said section 28 of the Organic

Act of Guam (this section), and as President of the United States, it is ordered as follows:

1. The following described real and personal property of the United States in Guam is hereby reserved to the United States and placed under the control and jurisdiction of the Secretary of the Navy:

Provided, That the Secretary of the Navy shall transfer such portions of such property to the Department of the Army, the Department of the Air Force, and the Coast Guard as may be required for their respective purposes:

(a) All of that real property in Guam situated within the perimeter areas defined in the following-designated condemnation proceedings in the Superior Court of Guam, being the same property quitclaimed by the Naval Government of Guam to the United States of America by deed dated July 31, 1950, and filed for record with the Land Registrar of Guam on August 4, 1950 (Presentation No. 22063):

* * * * *

3. In addition to the personal property described in paragraph 1 (e) hereof, there is hereby reserved to the United States all personal property of the United States in Guam, except that which is transferred to the government of Guam by or pursuant to section 28 (a) of the Organic Act of Guam (subsection (a) of this section), which on the date of this order, Oct. 31, 1950, is in the custody or control of the Department of the Army, the Department of the Navy, the Department of the Air Force, the Coast Guard, or any other department or agency of the United States; and all such personal property shall re-

main in the custody and control of the department or agency having custody and control thereof on the date of this order (Oct. 31, 1950).

* * * * *

Title 48, USCA § 1421 K. Designation of naval or military reservations; closed port.

Nothing contained in this chapter shall be construed as limiting the authority of the President to designate parts of Guam as naval or military reservations, nor to restrict his authority to treat Guam as a closed port with respect to the vessels and aircraft of foreign nations. Aug. 1, 1950, c. 512, § 33, 64 Stat. 393.

* * * * *

Section 33, Organic Act.

I.

APPELLANTS' ANSWER TO APPELLEES' POINT I.

Appellees contend that the *Laguana* case has conclusively decided the basic question to wit that a separate territorial tax has been created by the Organic Act; that the facts in that case and this one are the same, therefore, the issues are settled. Appellees very carefully fail to see, or admit, if they do see, two major differences. First, in the *Laguana* case he stipulated that Ansell was the duly constituted officer to collect this tax—a fact here in issue. Second, that the *Laguana* case is only *res judicata* as to Laguana and his privies. The two cases are not identical.

The appellees quote at length from that case which relies upon a supposed identity of situation between Guam and the Virgin Islands, yet set forth in italics on page 23 of their brief are the very words which spell out a vast difference.

One may be pardoned for agreeing with the learned District Judge quoted at the foot of page 23 and top of page 24 of the appellees' brief. It cannot be gain-said but that truly he has constructed a monumental edifice of confusion.

Appellees, despite their claim, do in fact base their whole position upon IT 4046 which either construes a statute without any legal authority to do so, if not to be enforced by the United States Treasury or abdicates a mandatory statutory duty if the power to construe exists. This is the real basis for the elaborate opinion in the *Laguana* case.

The position of appellees on page 25 of their brief that the contentions of the appellants reduce Section 31 to a nonentity is specious and an error when read in connection with Section 25 b, this section is a necessary saving clause.

Appellees' counsel did contrary to the implications of their brief, page 26, admit that no local statutory exists, T.R. 101, 102.

The numerous plays upon words by the appellees throughout this entire controversy—their half-truths, implications, and unfounded assumptions have been, as never before, clearly demonstrated by the bill introduced in the session of the Third Guam Legislature as Bill No. 57, at the request of the appellee, Elvidge,

seeking to enact a territorial tax having the same text as the United States income tax.

Clearly, there is more to the question than merely whose law is this and who shall interpret it and enforce it. Why is the local government so determined to have within their hands and in the hands of these appellees the entire control of this tax? Can it be the lust for power of bureaucrats, or is it deeper and do they fear, as the devil does holy water, the administration and collection of this tax by the duly constituted officers of the United States?

Appellees fail and do not wish to see one vital basic question; one involving the very jurisdiction of the Government of Guam. Appellants Wilson and White are employed by Brown-Pacific-Maxon, a contractor of the United States, living on a United States naval reservation and earning their incomes there. These reservations were owned by the United States prior to the passage of the Organic Act and under the sole and exclusive jurisdiction of the United States, acting through the Department of the Navy, were reserved to the United States by Executive Order 10178 of 31 October 1950; pursuant to specific authority to so reserve contained in Sections 28 (b), and 33, of the Organic Act.

Is that the same factual situation as the *Laguana* case? Hardly.

II.

APPELLANTS' REPLY TO APPELLEES' SECOND POINT.

Contrary to the nebulous concepts of appellees, Section 31 of the Organic Act clearly refers to a United States tax and Section 30 grants to Guam United States taxes. It does not refer to territorial taxes. The statute is clear. It can be understood. Can appellees be sustained in their construction which does violence to the plain words of the statute? It is an United States statute in toto; nothing else.

Appellees in their argument bottom it in its entirety upon an assumption, and buttress that with dicta and a superficial construction of the pertinent statutes.

Appellees try to conceal from this court, in page 30 of their brief, that the provision of Title XX, Chapter 6, General Code of Guam, is a revision and codification of a statute existing prior to the enactment of the Organic Act of Guam and placed in force by executive order of the naval governor. Appellees further attempt to conceal the admissions made by Louis A. Otto, Jr., and Richard Rosenberry, T.R. 101, 102, who have signed their brief.

 III.

APPELLANTS' REPLY TO APPELLEES' POINT III.

A. Appellees attempt to gloss over lightly the question of due process, refuse to acknowledge that the case of *Stone v. White* must be distinguished

and the very obvious fact that one cannot point out specific portions of a secret and unknown law.

As to *Stone v. White*, the question was who, as between two parties, should pay a tax arising from one source to a tax collector of the United States. Here the question is: Can the officers of one government collect a tax under alleged authority of such government, but under the laws of another. Appellants see some difference.

Appellees want appellants to be specific, yet object strenuously to telling appellants, or anyone else, what changes, if any, they claim to have made in the text of the statute. Likewise, appellees attempt to gloss over the obviously clear fact that no standards exist or if they do are not made known to anyone except appellees. Likewise, the lack of any method of review of taxes alleged to be due and demanded by appellees though discussed by appellees at the hearing. Appellees claim there is no question of the amount of appellants' liability. Appellants claim this is no liability on their part, but one on the part of appellees.

B. Appellees are confused as to appellants' contention as to a delegation of the legislative power of the Congress. Appellants contend that IT 4046 is an attempt by the commissioner of internal revenue to construe the provisions of the Organic Act of Guam in such a way as to constitute in fact an unlawful delegation of the legislative power and that the acts of the appellees are, in fact, an unlawful usurpation of that power; that their argument on

pages 33-35 is a blatant admission of such fact and attempt to justify it.

The Congress did erect a local government of three branches with distinct and separate powers and what it did in Alaska, Oklahoma or elsewhere cannot alter that fact. It vested legislative power in the Guam Legislature, not in Mr. Elvidge or any of the appellees.

C. If the point raised by appellees be of merit, sufficient to say that appellee Elvidge is an officer of the United States, paid by the United States and by a United States Treasury check. Further, it is the interpretations and claims of appellees that are challenged, not the Organic Act.

IV.

APPELLANTS' REPLY TO APPELLEES' POINT IV.

Replying to appellees' Point B, the court did dismiss the complaint. T.R. 77.

In reply to appellees' point C, appellants believe it is sufficient to point out that while affidavits may show the existence or non-existence of a controverted fact, affidavits cannot contravene facts alleged in the complaint and they cannot be used to prove a fact in lieu of testimony. An argument cannot take the place of evidence and while counsel may admit, his statements and claims are not evidence, appellants' very brief clearly demonstrates that there are substantial issues of fact.

Appellees' attempt to hide behind verbal clouds the one salient fact which becomes clearer as time goes on that they do not intend to state what changes, if any, they claim have been made in the United States income tax law. That they will tell no one, not even this court, what is the text of the altered tax law they are attempting to create, one can only assume therefore that they, themselves, do not know. Thus this alleged tax, similar to all decrees and ukase of irresponsible bureaucrats and their ilk is a fluid thing to be twisted, altered and shifted to meet the whims of the moment. If this is not vague, indefinite and ambiguous nothing is.

No discussion of their approach to Rule 36 is necessary—that rule has a purpose; appellees do not intend to permit its effective use.

As to Point D. Nothing need be said; the record of the district court of Guam speaks for itself. Appellants contend there was no ruling or consideration given as to Point E. The position of appellees is fantastic and is contrary to the facts and logic. Appellee Kennedy did not deny specifically, as required by the rule, nor file the proper objections, in fact, neither did the other appellees.

The verification of Richard Taitano clearly shows that appellee Kennedy did not answer the requests himself and probably did not even know whether or not they were answered. Obviously, the answer was tailored by counsel and it is absurd that Kennedy can be assumed to make the identical answer of other appellees.

V.

APPELLANTS' REPLY TO APPELLEES' POINT V.

Appellees claim that this is a territorial tax, yet they cite as their authorities statutes which pertain solely to taxes of the United States. Appellants allude in passing to this for the purpose of showing the fundamental inconsistency and chaotic mental processes of the proponents of this Siamese twin tax, neither fish nor fowl, but good red herring.

We have here the attempt to juggle various concepts as suits the needs of the immediate situation. Appellants contend that appellees are in the same position of the person who wants to move in opposite directions at the same instant.

VI.

APPELLANTS' REPLY TO APPELLEES' POINT VI.

Again, appellants contend that appellees want to have their cake and also want to eat it. If, in fact, they have a territorial tax there is no inhibition of law preventing the district court from granting injunction relief. If the district court does not have such jurisdiction, appellees have no tax. In either event, their approach lacks realism and must fall.

VII.

APPELLANTS' REPLY TO APPELLEES' POINT VII.

Again, appellees attempt to have a territorial tax and secure the benefits of jurisdictional limitation that refer solely to federal taxes. It can't be both. If they, themselves, have not clarified their concepts as to this amazing creation, how can they be heard now to claim that appellants should not seek the aid of the only power capable of bringing order out of disorder, light into darkness, and logic into Guam.

VIII.

APPELLANTS' REPLY TO APPELLEES' POINT VIII.

Suffice to indicate that appellants Bogovich and Tintorri are required to collect a tax, that if not a federal tax they have no protection; that they claim withholding in any event is illegal in a possession and they are required to perform such illegal act by appellants. Appellants contend that this is a sufficient claim under the federal rules. An accounting can be had to determine the amounts due. A cause of action no longer need be stated as appellees contend.

IX.

APPELLANTS' REPLY TO APPELLEES' POINT IX.

Appellants understand that the only immunity a public official can have is by virtue of the sovereign's immunity and the needs of the sovereign to throw

the cloak of his immunity around his officers when acting within the scope of their authority on his business. That this goes as far as the scope of their duties but no further; that each public officer or servant is responsible for his own torts based, we believe, upon the basis principle that a tort cannot be within the scope of any officer's duties. Clearly, whether or not appellees and their counsel recognized the fact the district court did rely upon this principle and to no one's surprise did apply it. T.R. 114, 115.

X.

APPELLANTS' REPLY TO APPELLEES' POINT X.

No comment is believed necessary other than to say that the court erred unless upon no conceivable grounds could appellants so amend the complaint as to set forth a claim for relief. Upon the state of the record and the confused situation, coupled with the evasive tactics and unknown text of the alleged law, can any judge say that appellants could not set forth a claim? Appellants are curious as to what rules of procedure, if any, appellees refer to when they assert that an argument on a motion and before an answer was filed the amended complaint should be offered to the court and leave to file be obtained.

XI.

APPELLEES HAVE CONCEDED APPELLANTS' POSITION IN THIS CAUSE BY THE EXECUTIVE ACTION OF APPELLEE ELVIDGE SUBSEQUENT TO THE DOCKETING OF THIS APPEAL.

Appellees have contended consistently throughout this action, as well as in various others, that they possess all the statutory authority necessary to support and sustain their acts. That there exists a territorial income tax and that, therefore, there exists a complete system of taxation under the authority of which appellees justify their actions.

We have, for many years, observed the increased weight and respect accorded executive construction and determination in matters of government. Executive construction is held entitled to great weight principally because of the intimate association with the problem and the detailed and exhaustive knowledge of the executive.

On the thirteenth day of April, 1955, at the request of appellee Ford Q. Elvidge, there were caused to be introduced in the Third Guam Legislature, 1955 (First) Regular Session, bills numbered 28, 46, 57, and 78, as urgency measures and both necessary and vital to the territorial government. See Certificate of the Secretary of the Legislature, as set forth in Appendix, page i and purpose clauses of said bills, pages ii-v, inclusive.

Clearly, this is an admission that the asserted claims of the appellees that their alleged statutes are neither complete nor existent. These bills attempt to, after

this appeal was docketed, furnish the statutory basis for the position taken by appellees. They thus attempt, after several years, to now construct the foundation upon which their entire edifice has been allegedly standing for four long years. Can there be a more effective concession than this attempt to procure statutory authority at this late date, which appellants in this very action claim is, first, not necessary; and second, already exists.

Appellants contend that this clearly demonstrates the complete lack of substance of the claimed rights and authority of appellees and should be construed as a confession of errors. It can hardly be possible that appellees are attempting to create two taxes in the same amount and applying to the same people.

If, as contended by appellees, there exists the statutory authority for their actions and for their claimed offices and duties, surely these bills and their alleged need and purpose are unnecessary. Appellants assert that the introduction of these bills clearly demonstrates the existence of the allegations of the complaint and makes clear the lack of any authority upon the part of the appellees to act as they have claimed the right to and as they have acted. These bills, by their introduction, demolish the entire position of appellees.

Has not this action conceded the basic contention of appellants; to wit, that appellees possess no authority, have never possessed such authority, and have attempted by executive action to create a taxing statute without benefit of legislative action.

Appellants conclude that clearly this demonstrates the error of the district court of Guam and that the appellants should be required to answer the complaint upon the merits.

CONCLUSION.

Appellants assert that the district court of Guam should be reversed and that judgment for appellants should be directed, or that appellees should be required to answer the complaint upon the merits.

Appellants have consistently contended that there was no statutory authority for the action of appellees, that the claimed tax so long kept secret, is vague and ambiguous, lacks clarity and standards, and that there exists under the claims of appellees no safeguards of any sort. That this entire controversy is the result of the refusal of the appellees to admit the details of their claimed statute, to set forth the amendments and alterations they claim to have made, or to, in keeping with current concepts of jurisprudence as embodied in the federal rules, lay all the cards upon the table and have a cause decided upon the complete factual situation rather than upon the skillful play of words and the technics of a game of wits.

Appellants conclude that the records of this action and the briefs submitted completely sustain their

position and demonstrate the untenable one of appellees.

Therefore, the district court should be reversed.

Dated, Agana, Guam,

July 25, 1955.

Respectfully submitted,

FINTON J. PHELAN, JR.,

Attorney for Appellants.

(Appendix Follows.)

Appendix.

Appendix

Third Guam Legislature
Territory of Guam
(Seal)

F. B. Leon Guerro

Speaker

B. J. Bordallo

Vice-Speaker

A. B. N. Duenas,

Legislative Secretary

Rev. F. C. Flores

Chaplain

John A. Bohn

Counsel

Box 373, Agana, Guam,
7-332

April 13, 1955

Mr. E. R. Crain

Attorney-at-Law

Agana, Guam

Dear Mr. Crain:

Copies of Bills No. 28, 46, 57 and 78, Third Guam Legislature, are herewith forwarded in compliance with your letter of April 7th. All four bills were submitted to the Legislature by the Governor.

Very truly yours,

/s/ Maria C. Duenas

Maria C. Duenas

Executive Secretary

Enclosures (4)

Third Guam Legislature
1955 (First) Regular Session

Bill No. 28 Introduced by.....

Committee on Finance & Taxation, by request.

An Act to add Chapter 10, Title XX, to the Government Code of Guam, for the purpose of enabling other states, territories, and possessions of the United States, and their political subdivisions, to maintain suits in the District Court of Guam to recover taxes on a reciprocal basis, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. There is hereby added to Title XX,
3 of the Government Code of Guam a new Chapter
10 to read as follows:

4 “Chapter 10

5 Reciprocal Tax Claims Act

6 Section 19800. Definitions. As used in this
Act:

* * * * * *

10 Section 2. This Act is urgency measure and
shall take effect

11 upon its approval by the Governor.

* * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 57 Introduced by.....

Committee on Finance and Taxation, by request.

An Act to add Chapter 7 to Title XX of the Government Code of Guam, concerning the Guam Territorial Income Tax.

Be It Enacted by the People of the Territory of Guam:

* * * * * *

10 Section 19600.0. Authority of Department of Finance.

* * * * * *

3 Section 2. This Act is an urgency measure and shall take

4 effect upon the approval of the Governor.

* * * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 46

Introduced by.....

Committee on Finance and Taxation, by request.

An Act to clarify and add various enforcement provisions to the Business Privilege Tax Law. Chapter 6, Title XX, of the Government Code, by adding Sections 19527 and 19528, by repealing Subsection 19501.0206 of Section 19501 and adding Section 19529, by repealing Subsection 19501.0213 of Section 19501 and adding Section 19530, by amending Subsection 19566.01 of Sec-

tion 19566, by adding Subsection 19593.03 to Section 19593, by repealing present Subsection 19501.05 of Section 19501 and adding a new Subsection 19501.05 to Section 19501, by repealing present Section 19503 and adding a new Section 19503, by amending Sections 19504, 19506, 19510, and 19511, by amending Subsection 19513.04 of Section 19513, by adding Subsection 19513.08 to Section 19513, by amending Subsection 19541.0104 of Section 19541, by amending Section 19542, by amending Subsections 19543.08 and 19543.1010 of Section 19543, and to add Chapter 1 to Title XX of the Government Code, relative to the functions of the Director of Finance and the Commissioner of Revenue and Taxation, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. Section 19527 is hereby added to
3 Chapter 6 Title XX, Government Code, as fol-
lows:

* * * * *

3 Section 19001. Commissioner of Taxation. There
4 shall be in the Department of Finance a Com-
5 missioner of Revenue and Taxation who shall
6 have such duties and powers as may be provided
7 by law or prescribed by the Director.

* * * * *

15 Section 20. This is an urgency measure and
shall take
16 effect upon its approval by the Governor.

* * * * *

Third Guam Legislature
1955 (First) Regular Session

Bill No. 78

Introduced by.....

Committee on Finance and Taxation, by request
An Act to add Chapter 8 to Title XX, Govern-
ment Code of Guam, to require the filing of copies
of the United States income tax returns under
certain conditions, and for other purposes.

1 Be It Enacted by the People of the Territory
of Guam:

2 Section 1. The following Chapter 8 is hereby
added to

3 Title XX, Government Code of Guam:

4 "Chapter 8

5 Copies of Federal Tax Returns

6 Section 1. Purpose. The purpose of this chap-
ter is to

7 aid the officials of the Government of Guam
8 in the prevention of tax evasion and thereby to
protect the revenues of the

9 Government of Guam.

* * * * *

33 Section 2. This Act is an urgency measure and
shall take

34 effect upon its approval by the Governor.

* * * * *

